

floor and denied that they had ever stated that it applied more broadly than that. There was no credible testimony to the contrary. Employees who testified that the tips policy applied more broadly referenced statements of other "employees on the floor," "rumor," "word of mouth," "scuttlebutt," and "grapevine" as the source of their information that employees could not talk about tips anywhere on the premises. Based on extremely weak evidence, the Board concluded that the tips policy was overbroad. The record is clear, however, that management never enforced the tips policy beyond the gaming floor and never disciplined employees for discussing tips in any other areas.³

This case illustrates the danger of the Tenth Circuit's holding. If a policy intended by management to apply only within a proper scope or area can be expanded by employee discussion to the point of overbreadth, employees who are disciplined for violation of the policy, even within its valid scope of application, will be imbued with immunity for their misconduct. The Tenth Circuit's holding gives employees an inordinate motivation to make every effort, both in the work place and in their testimony, to expand the scope of policies in order to claim entitlement to the "overbreadth" trump card. Moreover, absolute perfection in drafting and communicating employment policies is difficult to achieve. While employers should certainly be required to revise or clarify imperfect or overbroad policies, disciplinary actions should not be overturned unless they were based upon enforcement of a policy in an unlawful manner. In this case, Double Eagle only enforced its policy within a lawful and proper scope.

C. The Tenth Circuit's opinion eviscerates an employer's right to discipline for cause.

Section I.B. above addresses the widely recognized prerogative an employer to discipline employees for cause.

³ The scope of the tips policy is not a matter of dispute at this stage of the proceedings because Double Eagle is, and has always been, willing to limit its tips policy to the gaming floor and adjacent areas. That was always intended to be the scope of the policy.

That prerogative has been recognized repeatedly by this Court and has been incorporated by Congress in the statutory enactments referenced above. The Tenth Circuit's opinion in this case conflicts with the principles announced by this Court's prior rulings and incorporated into those statutes. Granting Double Eagle's Petition will allow this Court to correct those conflicts and preserve a carefully drawn balance between employer and employee rights and remedies.

III. The Tenth Circuit's Opinion In This Case Has Disrupted The Balance Struck By Other Circuit Courts Between Employees' Rights To Communicate And An Employer's Right To Maintain Confidential Employee Information.

In a time in which the handling of private information has become a matter of significant concern, legislation and regulation (*see, e.g.*, HIPAA Privacy Rules, 45 CFR, Parts 160-164), the Tenth Circuit has adopted what is essentially a bright line rule that a confidential information policy is unlawful under the NLRA if it forbids disclosure of anything that could fit into the category of working conditions. The Tenth Circuit found that Double Eagle's definition of "confidential information" clearly violates Section 8(a)(1) because it expressly includes salary information and information regarding pay increases. Thus, an employee in Double Eagle's payroll office is free to disclose information about other employees' salaries or pay increases with impunity under the Tenth Circuit's holding in this case. That balance is significantly at odds with the balance struck by other circuits in cases referenced at pages 26 through 28 of Double Eagle's Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth herein and in its Petition for Writ of Certiorari, Double Eagle respectfully prays this Court to grant its Writ of Certiorari to review the important questions raised in this case.

Respectfully submitted,

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